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Supreme Court, U.S.
FILED
AUG 23 2001
OFFICE OF THE CLERK

No. 00-1073

IN THE

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, aka OWASSO PUBLIC SCHOOLS, *et al.*,
Petitioners,

v.

KRISTJA J. FALVO, PARENT and NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN and ERICA PLETAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO AS *AMICI CURIAE* SUPPORTING PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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This brief *amici curiae* is filed by the National Education Association ("NEA") and the American Federation of Teachers, AFL-CIO ("AFT"), with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE *AMICI CURIAE* [1]

NEA and AFT are nationwide employee organizations—with memberships of approximately 2.6 million and one million, respectively. A substantial majority of NEA and AFT members are employed as teachers in public school districts throughout the United States. These members—with the approval of their employing school districts—routinely use the grading practice that is at issue in this case—*i.e.*, the practice of allowing students to grade one another's homework and quizzes as their teacher goes over the answers aloud in class. Accordingly, NEA and AFT have a direct interest in the question of whether that grading practice is lawful—and in the antecedent question of whether students and their parents in any event can bring a 42 U.S.C. § 1983 action against NEA and AFT members who engage in the practice.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides, in pertinent part, that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents," other than in certain statutorily identified circumstances. 20 U.S.C. § 1232g(b)(1) (1994 & Supp. V 1999); *see also* 20 U.S.C. § 1232g(b)(2).

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[1] Counsel for a party has not authored this brief in whole or in part. No person or entity other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or filing of this brief.

The United States Court of Appeals for the Tenth Circuit held that the grading practice complained of by respondent falls within this statutory proscription, because—by its "plain language"—FERPA's definition of "education records" encompasses the grades at issue, thus prohibiting the "release" of those grades to fellow students without parental consent. 233 F.3d at 1218; *see also id.* at 1215.[2]

Before reaching "the merits of [respondent's] FERPA claim," *id.* at 1211, the Court of Appeals raised *sua sponte* the antecedent "[j]urisdiction[al]" question of whether "a [claimed] violation of FERPA may be the basis for a civil rights lawsuit under 42 U.S.C. § 1983," *id.* at 1210. The court below answered this question in the affirmative, concluding that: (1) "20 U.S.C. § 1232g(b)(1) creates an enforceable right within the meaning of § 1983," *id.* at 1211[3]; and (2) "Congress did not impliedly foreclose a § 1983 remedy by creating a comprehensive remedial scheme within FERPA itself," *id.* at 1212.

The Court of Appeals answered this antecedent jurisdictional question incorrectly. Under this Court's precedents, a § 1983 claim predicated on the alleged violation of a

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[2] Subject to certain enumerated exceptions, FERPA defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A).

[3] In reaching this conclusion, the Court of Appeals stated that a three-part inquiry is required by *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990), and then reasoned as follows: *first*, that "[t]he plain language of the relevant provision of FERPA, 20 U.S.C. § 1232g(b)(1), reveals that it is intended to protect the privacy of students and their parents"; *second*, that "the provision reflects a binding obligation on schools, rather than a mere congressional preference for a certain kind of conduct"; and, *third*, that "the interest which [respondent] asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce." 233 F.3d at 1211.

statutory provision will lie only where—at an irreducible minimum—the statutory provision in question can be read to create an enforceable federal right of some kind in favor of the party making the claim. FERPA, 20 U.S.C. § 1232g(b)(1) can *not* be read to create an enforceable federal right of any kind in favor of students and their parents, because this section is phrased—not in "'rights-creating' language," *Alexander v. Sandoval*, 532 U.S. ___, 121 S. Ct. 1511, 1521 (2001)—but rather as a directive to the Secretary of Education to withhold federal funds from any educational agency or institution that engages in a policy or practice proscribed by that statutory provision. For this reason, the judgment below should be reversed, and the case remanded with instructions to dismiss respondent's putative § 1983 action alleging a violation of FERPA, 20 U.S.C. § 1232g(b)(1). *Infra* pp. 4-10.

Assuming, *arguendo,* that the Court does not dispose of this case on the above ground, the court below in any event erred in holding that the challenged grading practice violates FERPA, 20 U.S.C. § 1232g(b)(1). As to this issue, we essentially defer to petitioners, and supplement their submission by emphasizing only one point. While Congress certainly would be at liberty to conclude that the privacy interests of students vis-à-vis other students outweigh the educational benefits of the challenged grading practice—and on that basis provide federal funds only to school districts that do not allow their teachers to use the practice—federalism principles dictate that Congress speak "unambiguously"/"with a clear voice" if that is its policy judgment and chosen legislative solution. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Court of Appeals implicitly concluded that FERPA satisfies this clear-statement rule with respect to the challenged grading practice—inasmuch as it found the practice to be at odds with FERPA's "plain language"—but that implicit conclusion cannot bear scrutiny. *Infra* pp. 10-13.

ARGUMENT

I.

By its terms, 42 U.S.C. § 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." This Court held in *Maine v. Thiboutot*, 448 U.S. 1 (1980), that § 1983 "safeguards certain *rights* conferred by federal statutes." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis added). Thus, "[i]n order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.* (emphasis in original).

"Whether a federal statute confers substantive rights is not an issue unique to § 1983 actions. In implied right of action cases, the Court also has asked, since *Cort v. Ash*, 422 U.S. 66, 78 (1975), whether 'the statute create[s] a federal right in favor of the plaintiff.'" *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 433 (1987) (O'Connor, J., dissenting). *See also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 526 (1990) (Rehnquist, C.J., dissenting) ("For relief to be had either under § 1983 or by implication under *Cort v. Ash, supra*, the language used by Congress must confer identifiable enforceable rights.").

Inasmuch as the inquiry into whether a statutory provision creates enforceable federal rights is coterminous in the § 1983 and implied-right-of-action contexts,[4] it is proper to look

[4] Because both of the above-cited quotations affirmatively embracing this proposition are from dissenting opinions, we feel compelled to note that neither the majority in *Wright* nor the majority in *Wilder* took issue with this proposition. To the contrary, in each case, the majority undertook a statutory analysis akin to that required in implied-right-of-action cases under *Cort v. Ash* in order to determine whether the operative statutory provision created the enforceable federal right asserted by the putative § 1983 plaintiff; in each case, the majority simply read the operative statutory provision differently than the dissent. *See Wright*, 479 U.S. at 429-32; *Wilder*, 496 U.S. at 509-20. And indeed, any doubt that this Court's precedents stand for the proposition affirmatively embraced by the *Wright* and *Wilder* dissenters is laid to rest by the Court's subsequent decision in *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992), in which the Court—having concluded that the statutory provision in question did not create the enforceable federal right claimed by the plaintiff *for § 1983 purposes*—went on to conclude that the question of whether that statutory provision gave rise to an implied right of action in favor of the plaintiff under *Cort v. Ash* could "be disposed of quickly" in the negative. *See also Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 29 n.12 (1982).

to the Court's implied-right-of-action cases to determine whether—for § 1983 purposes—FERPA, 20 U.S.C. § 1232g(b)(1) creates an enforceable federal right of some kind in favor of students and their parents. The Court's three most closely on-point implied-right-of-action decisions since *Cort v. Ash*—including the latest decision in that line, *Alexander v. Sandoval, supra*—leave no doubt that the answer to this question is "no."[5]

In *Cannon* v. *Univ. of Chicago*, 441 U.S. 677 (1979), the Court held that plaintiffs alleging a violation of § 901(a) of Title IX of the Education Amendments of 1972 have an implied right of action to enforce that provision—which provides, in pertinent part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. In so holding, the Court attached near dispositive weight to the fact that § 901(a) of Title IX is phrased in language evincing a congressional intent to confer identifiable rights on a discrete class of persons (*i.e.*, persons discriminated against

[5] The many implied-right-of-action decisions we leave out buttress this conclusion, *see, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 292-98 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-24 (1979).

on the basis of sex by certain recipients of federal funds)—noting that "[w]ith the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Id.* at 690 & n.13, 693-94. Dispelling any doubt as to the significance of such rights-creating language, the Court added that "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 691-93.[6]

Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), involved a federal construction contract that did not contain a prevailing wage stipulation because it had been administratively determined that the work in question did not come within the ambit of the Davis-Bacon Act. Employees working under the contract sought to challenge the absence of the stipulation and recover back wages, but the Court held that § 1 of the Davis-Bacon Act did not create an implied right of action in their favor. That holding was based on the analysis in *Cannon*:

> The Court consistently has found that Congress intended to create a cause of action "where the language of the

[6] In this regard, the Court drew further significance from the fact that "[i]n adopting Title IX in its present form, . . . Congress passed over an alternative proposal . . . that was phrased quite differently—as a simple directive to the Secretary of HEW" to withhold federal funds from educational institutions absent satisfactory assurances from those institutions that they would not discriminate on the basis of sex. 441 U.S. at 693 n.14.

> statute explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in the case." *Cannon* . . ., 441 U.S. [at] 690, n.13 . . . . Conversely, it has noted that there "would be far less reason to infer a private remedy in favor of individual persons" where Congress, rather than drafting the legislation "with an unmistakable focus on the benefited class," instead has framed the statute simply as a general prohibition or a command to a federal agency. *Id.*, at 690-692. Section 1 of the Davis-Bacon Act requires that certain stipulations be placed in federal construction contracts for the benefit of mechanics and laborers, but it does not confer rights directly on those individuals. Since § 1 is simply "phrased as a directive to federal agencies engaged in the disbursement of public funds," 441 U.S., at 693, n. 14, its language provides no support for the implication of a private remedy. [450 U.S. at 771-73 (internal citations and footnotes omitted).]

Just last term, in *Alexander v. Sandoval*, *supra*, the Court held that private individuals do not have an implied right of action to enforce disparate-impact regulations promulgated by federal agencies pursuant to § 602 of Title VI of the Civil Rights Act of 1964. In support of this holding, the Court relied largely on *Cannon* and *Universities Research Ass'n*:

> Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." . . . It is immediately clear that the "rights-creating" language so critical to the Court's analysis in *Cannon* . . . is completely absent from § 602. . . . Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuat[ing]" rights already created by § 601. And the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person

regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn.* . . ., § 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds," [450 U.S.] at 772. When this is true, "[t]here [is] far less reason to infer a private remedy in favor of individual persons," *Cannon* . . ., [441 U.S.] at 690-91. So far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action. [121 S. Ct. at 1520-21 (internal citations omitted).]

FERPA, 20 U.S.C. § 1232g(b)(1) is qualitatively different from the language that was found to create an enforceable federal right in favor of the plaintiffs in *Cannon*, and is on all fours with the statutory provisions found not to create such a right in *Universities Research Ass'n* and *Alexander*. Like those latter statutory provisions, 20 U.S.C. § 1232g(b)(1) is phrased not in rights-creating language, but rather as a directive to a federal agency engaged in the distribution of public funds: *viz.*, "No funds shall be made available [by the Department of Education] under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents." Accordingly, 20 U.S.C. § 1232g(b)(1) does *not* create an enforceable federal right of any kind in favor of students and their parents.[7]

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[7] Nor is this conclusion in any way contrary to the holdings of *Wright* and *Wilder*, *supra*: in each of those cases, the Court found that the operative statutory provision *was* phrased in language evincing a congressional intent to confer enforceable federal rights on the class of persons to which the plaintiffs belonged. *See Wright*, 479 U.S. at 430; *Wilder*, 496 U.S. at 510.

In reaching the opposite conclusion, the court below observed that, by its "plain language," 20 U.S.C. § 1232g(b)(1) "is intended to protect the privacy of students and their parents." 233 F.3d at 1211. This observation—which undoubtedly is correct—misses the point, as *Universities Research Ass'n* conclusively demonstrates. There, the Court recognized that, "[o]n its face," the Davis-Bacon Act "is a minimum wage law designed for the benefit of construction workers." 450 U.S. at 771. But, the Court added: "[T]he fact that an enactment is designed to benefit a particular class does not end the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation." *Id.* To answer that question, the Court combed the relevant provision of the Davis-Bacon Act for rights-creating language, and, finding none, it concluded that Congress had not intended to create enforceable federal rights in favor of the construction worker plaintiffs—notwithstanding the fact that the provision in question "is intended to protect" those workers. *Id.* at 771-73. *See also Alexander*, 121 S. Ct. at 1521 ("[T]he focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection"); *California v. Sierra Club*, 451 U.S. 287, 294 (1981) ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries"); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect [investment] advisers' clients does not require the implication of a private cause of action for damages on their behalf.").

In sum, this Court's precedents make clear that FERPA, 20 U.S.C. § 1232g(b)(1) does *not* create an enforceable federal right of any kind in favor of students and their parents. That being so, even assuming *arguendo* that the grading practice complained of violates 20 U.S.C. § 1232g(b)(1), respondent has not alleged the deprivation of any "rights, privileges, or immunities" within the meaning of 42 U.S.C. § 1983, and her putative § 1983 action fails at its inception. The Court of Appeals' holding to the contrary is erroneous, and should be reversed.[8]

II.

Turning to the merits of respondent's claim, we believe that the court below erred when it held that the challenged grading practice violates FERPA, 20 U.S.C. § 1232g(b)(1). In this regard, we essentially defer to petitioners, and make only one point in supplementation of their submission.

The grading practice at issue is widely used throughout the United States because many teachers—and their employing school districts—have found it to be educationally beneficial. The District Court identified certain of these benefits,[9] and

[8] Inasmuch as 20 U.S.C. § 1232g(b)(1) does not create an enforceable federal right of any kind in favor of students and their parents, this Court need not consider certain additional determinations made by the court below—specifically, *supra* p. 2 n. 3, that "th[e] provision reflects a binding obligation on schools, rather than a mere congressional preference for a certain kind of conduct," and that "the interest which [respondent] asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce," *see Wilder*, 496 U.S. at 509; and, *supra* p. 2, that "Congress did not impliedly foreclose a § 1983 remedy by creating a comprehensive remedial scheme within FERPA itself," *see Suter*, 503 U.S. at 360 n.11; *cf. Blessing*, 520 U.S. at 346.

[9] The District Court noted, for example, that if teachers are not allowed to have students grade one another's homework and quizzes, and are required to do all such grading themselves, "students will receive their results after delay," denying them valuable immediate feedback. (Pet. App. C-6).

concluded that proscription of the practice "may have a detrimental effect upon both teaching and learning." (Pet. App. at C-6).

This is not to suggest that the practice is universally embraced by all teachers and school districts; it is not, and that is precisely the point. The question of whether to engage in this practice—and, if so, when and to what extent—is uniquely suited to local resolution by teachers and school districts on a case-by-case basis. That being said, we recognize that Congress would be at liberty to conclude—as a general proposition—that the privacy interests of students vis-à-vis other students outweigh the educational benefits of such a grading practice—and on that basis provide federal funds only to school districts that do not allow their teachers to use the practice.

Basic principles of federalism dictate, however, that where Congress wishes to use its spending power as a means of regulating in areas traditionally entrusted to local control (and public school education certainly is such an area), Congress must make its intentions unmistakably clear. As the Court explained in *Pennhurst*, *supra*:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly,

> cognizant of the consequences of their participation. [451 U.S. at 17 (internal citations and footnote omitted).]

See also e.g. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

The court below implicitly concluded that FERPA satisfies this clear-statement rule with respect to the challenged grading practice—inasmuch as it found the practice to be at odds with FERPA's "plain language"—but that implicit conclusion cannot bear scrutiny. As petitioners have shown in their brief—and we will not burden the Court with a repetition of that showing here—the statutory language cuts strongly against the Court of Appeals' conclusion that the challenged grading practice violates FERPA. By no stretch of the imagination, however, can it be said that the Court of Appeals' conclusion flows *clearly* and *unambiguously* from FERPA's language, such that no school district receiving federal funds could help but be aware of its obligation to prohibit its teachers from using the practice. *Compare South Dakota v. Dole*, 483 U.S. at 208.

Indeed, the Court of Appeals' implicit conclusion that this Court's clear-statement rule is satisfied here is belied by the "longstanding" view of the federal agency responsible for FERPA's administration—the Department of Education—that FERPA, 20 U.S.C. § 1232g(b)(1) does *not* "prohibit students from grading other students' homework or tests in class because such papers and grades are not 'maintained' by the school at that point and therefore are not 'education records' within the meaning of the statute." Brief for the United States on Petition for a Writ of Certiorari at 17. As the *Pennhurst* Court found in analogous circumstances:

> [I]t strains credulity to argue that participating States should have known of their "obligations" under § 6010 [of the Developmentally Disabled Assistance and Bill of Rights Act of 1975] when the Secretary of HHS, the governmental agency responsible for the administration

> of the Act and the agency with which the participating States have the most contact, has never understood § 6010 to impose conditions on participating States. Though Congress' power to legislate under the spending power is broad, it does not include surprising States with postacceptance or "retroactive" conditions. [451 U.S. at 25.]

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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